IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 23 OF 2006.

Ms. Helen Carvalho,
daughter of late Jose da Cunha,
major, married,
resident of Shetyewaddo,
Pedem, Mapusa, Bardez, Goa. .... Appellant.

Versus

1. Ms. Maria Teresa da Cunha
   alias Maria Teresa Constantion
   alias Maria D'Cunha,
   widow of late Jose Da Cunha,
   major, resident of Ucassaim,
   Bardez, Goa.
2. Mr. Tony Martin da Cunha,
   son of late Jose da Cunha,
   major, resident of Ucassaim,
   Bardez, Goa.
3. Ms. Chantal da Cunha,
   wife of Tony Martin da Cunha,
   major, resident of Ucassaim,
   Bardez,Goa.
4. Mr. Francisco Carvalho,
   major, resident of Shetyewaddo,
   Pedem, Mapusa, Bardez, Goa.
5. Ms. Effifania da Cunha,
   daughter of late Jose da Cunha,
   major, spinster,
   resident at Ucassaim,
   Bardez, Goa. .... Respondents.

Mr. M. S. Usgaonkar, Senior Advocate with Mr. I. Agha, Advocate for the Appellant.

Mr. J.P. Mulgaonkar, Advocate for the Respondent Nos.1, 2 and 5.

CORAM: SMT. RANJANA DESAI, J.

Date of Reserving the Judgment : 30th June, 2006.
Date of Pronouncing the Judgment : 12th July, 2006

J U D G M E N T:

In this appeal, the appellant has challenged the order dated 28.11.2005 passed by the Civil Judge, Senior Division, Mapusa in Inventory Proceeding No.90/02/C. Few facts which give rise to the present appeal as narrated by the appellant may have to be stated. Inventory Proceeding No.90/02/C came to be instituted upon the death of Jose da Cunha. Respondent 1 is the moiety holder of the deceased. The appellant and respondent 5 are daughters of the deceased; respondent 2 is the son of the deceased; respondents 3 and 4 are the spouses of respondent 2 and the appellant respectively. The subject matter of the Inventory proceeding is a property consisting of land admeasuring 4650 sq. metres situated at Ucassaim and a house therein admeasuring about 374 sq.m.

2. According to the appellant, the valuer appointed by the Court valued the said property at Rs.2,00,000/- on 13.01.03. On 24.02.03 the appellant, by application complained about the under valuation of the said property by the valuer and asserted that the value was not less than Rs.6,00,000/-. On 14.08.03 the valuation of the said property submitted by the appellant on 24.02.03 was accepted by the Court. On 14.11.03 respondent 1 made an application offering a bid of Rs.7,00,000/-.

Respondent 1 prayed for auction of the property and requested that a date be fixed for the auction. This application is at Exh.17. On 14.11.03 the appellant by application (Exh.18) prayed that the said property be put to auction between the parties. On 20.12.03 the appellant by an application prayed that the date of auction be postponed. Again on 05.02.04 the appellant made a similar request. The Advocate for respondent 1 objected to this and prayed that the auction may be fixed.

3. Thereafter the matter was adjourned on numerous occasions from 11.02.04 to 29.11.04 for reply/arguments on applications (Exhs.17 and 18). On 29.04.04 the Court again fixed the matter for reply/arguments on applications (Exhs. 17 and 18) on 6.05.04. According to the appellant the Court did not fix any date for holding auction.

4. It is the case of the appellant that on 6.05.04 the Court held auction on the date when the matter was fixed for reply/arguments on applications (Exhs.17 and 18) and the said property was taken in auction by respondent 1 for the price of Rs.6,00,000/-. On 28.07.04 the appellant for the first time learnt about the auction held on 6.05.04 when the advocate for respondent 4 served a copy of the application filed on 21.06.04 for setting aside the auction held by the Court. On 28.09.04 the appellant filed an application for setting aside the auction held on 6.05.04 stating therein

that no notice of auction was served on the appellant and that the auction was held behind her back and without following the correct procedure of law. On 29.10.04 respondent 1 filed a reply to the objections raised by the appellant. On 28.11.05 the learned judge dismissed the objections raised by the appellant. Being aggrieved by this order the appellant has preferred this Appeal from Order.

5. I have heard the learned senior counsel Mr. Usgaonkar who appears for the appellant and Mr. Mulgaonkar, the learned counsel who appears for the respondents. Mr. Mulgaonkar raised a preliminary objection as regards the maintainability of the present appeal from order. He submitted that there is no provision under the Code of Civil Procedure (C.P.C. for short) under which the appellant could have sought setting aside of the order passed by the trial Court. The application, was therefore, filed under S. 151 of C.P.C. This is clear from the observations made by the learned Judge in his order. The learned Judge has referred to Section 151 of C.P.C. and stated that if the Court is misled by the parties, the Court can correct its order by resorting to Section 151 of C.P.C. He has observed however that in this case it cannot be said that the Court was misled or there was fraud and therefore he has dismissed the application. The learned counsel submitted that if the application was filed under Section 151 of C.P.C., then an appeal against that order would not lie to this Court.

The learned counsel referred to Article 1414 of the Family Laws of Goa, Daman and Diu He particularly placed reliance on paragraph 2 of Art.1414 where it is stated that no special appeal shall lie from the order referred to in that article; however, the order may be challenged in the final appeal against judgment confirming the partition. He therefore submitted that the appeal should be dismissed as not maintainable.

6. Mr. Usgaonkar, the learned senior counsel on the other hand, referred to Section 94 of C.P.C. and contended that under this provision in order to prevent the ends of justice being defeated, the Court may, if it is so prescribed, make such other interlocutory orders as may appear to the Court to be just and convenient. Mr. Usgaonkar then referred to Article 1372 of the Family Laws of Goa which state that the heirs and the moiety holder, who are not treated exparte shall be notified of the final judgement and of the parties, meetings of the family council, licitations, sortitions, of the order directing the examination of the chart of partitions and of the order directing payment of tax on conveyance. To those who are treated exparte no notice is required to be served in case they are residing outside the jurisdiction of the Court and in case they reside within the jurisdiction they shall be notified of the final judgement. The learned counsel also referred to Article 194 of the Portuguese Civil Procedure Code of 1939. So far as it is relevant, it reads thus :-

> " All proceedings excluding the initial petition are null and void where:
>
> 1. The defendant has not been summoned. "

7. Mr. Usgaonkar then referred to Article 195 of the Portuguese C.P.C. . So far as it is relevant, it reads thus :-

> " There is an absence of summons to the party:-
> 1. Where the service of summons has been completely omitted . "

8. I may also quote Article 228 of the same Code on which reliance has been placed by Mr. Usgaonkar. It reads thus :-

> " Summons is an act by which the defendant is given notice that the proceedings have been instituted against him and he is called upon to defendant.
> The same method is adopted by similarity to give notice to join, for the first time, any party who has interest in the proceedings.
> The notice is meant, in other cases, to call upon the party to give notice of any act or of any event. "

Article 256 to which reference was made reads thus :-

> " Where the party is being given notice to appear in person, the provisions relating to summons shall be applicable. "

9. Mr. Usgaonkar contended that therefore serving of notice on a party is a must and all proceedings including the initial petition are null and void where the defendant has not been summoned. He submitted that these provisions of Portuguese C.P.C. are still applicable to Inventory proceedings. In this connection he relied on a judgment of this Court in ***Zacarias Durate*** Domingos ***Pereira v. Camilo Inacio Evaristo Pereira (1990 (1) Goa L.T. (174).*** He then referred to another judgment of this Court in ***Aruna Devi N. Gaekwad v. Sanjita Udaisingh Rane (2000 (2) Goa L.T. 479).*** He then referred to yet another judgment of this Court in **Shri Krishna Mhalu Pai Raikar v. Shri Hari Mhalu Pai Raikar** delivered by this Court on 12.04.2001 in Appeal from Order No. 16/2000 and contended that an order passed in Inventory proceedings can be challenged by way of Appeal from Order in this Court.

10. Mr. Mulgaonkar, on the other hand, submitted that the notice contemplated in the Family Laws of Goa and also in the Portuguese C.P.C. of 1939 is the initial notice of the proceedings. In this case initial notice of the proceedings was served on the appellant. The appellant had notice

that Inventory proceedings were going on; the appellant had offered bid; the appellant knew that valuation of the property was done; the appellant had objected to the valuation and therefore it is not open for the appellant to say that notice of the auction was not given to her. Mr. Mulgaonkar submitted that the provisions cited by Mr. Usgaonkar would therefore be of no use to the appellant.

11. As regards the preliminary objection regarding the maintainability of the present appeal from order is concerned, the law is well settled by this Court by its judgment in **Krishna Mhalu Pai Raikar's** case (supra) where it is held the appeal from order can be maintained under Section 104 of C.P.C. against order passed in Inventory proceedings. The preliminary objection raised by Mr. Mulgaonkar must therefore fail.

12. Roznama of the proceedings is annexed to the appeal from order. The roznama clearly indicates that the appellant had participated in the Inventory proceedings. The property was valued; objections were raised by the appellant; the appellant had offered her bid; the appellant had asked for two adjournments of auction, but the fact remains that on crucial date of auction neither the appellant nor her advocate were present. I am not impressed by Mr. Mulgaonkar's submission that the appellant had notice of the inventory proceedings therefore no separate

notice of the auction was necessary. The first notice of the proceedings will not cure the absence of notice of the date of auction. The provisions to which my attention is drawn by Mr. Usgaonkar are still applicable to inventory proceedings and they clearly make requirement of notice evident. Ex parte orders are by their very nature vulnerable. They are against the principles of natural justice and courts are always inclined to set them aside, may be in a given case after saddling a party with costs if it is found to be negligent. In the circumstances the impugned order will have to be set aside. However I feel that the appellant and her lawyer ought to have been more careful. Inconvenience caused to respondent 1 who is an old lady must be compensated by saddling the appellant with costs.

13. Hence the impugned order dated 28.11.05 is quashed and set aside. The Court seized of the matter is directed to hold fresh auction after giving notice thereof to the parties. In the circumstances of the case, the appellant is directed to pay costs quantified at Rs.15,000/- to respondent 1. If the amount is not paid within a period of one month from today, the auction held on 6.05.04 shall stand. Payment of costs will be condition precedent to holding of a fresh auction.

Appeal from Order disposed of.

SMT. RANJANA DESAI, J.

sl.